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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 657

W. T. ODELL, R. R. IVEY, J. A. RUSSELL, CLEMMIE G. TAYLOR, AND R. M. DENNIS,
Petitioners,

vs.

HUMBLE OIL & REFINING COMPANY,
A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

W. D. GIRAND, JR.,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 657

W. T. ODELL, R. R. IVEY, J. A. RUSSELL, CLEMMIE G. TAYLOR, AND R. M. DENNIS,
Petitioners,

vs.

HUMBLE OIL & REFINING COMPANY,
A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

W. T. Odell, R. R. Ivey, J. A. Russell, Clemmie G. Taylor and R. M. Dennis jointly pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

Opinion Below

No opinion was written by the District Court in this case. The opinion of the United States Court of Appeals for the Tenth Circuit has not been reported, but appears in the printed record at pages 20 to 27 inclusive. The opinion was entered on January 2, 1953.

Summary Statement of Matter Involved

A civil action in five counts was filed in the United States District Court for the District of New Mexico (R. 3). Each of the petitioners sought judgment for $100,000.00 actual damage and $100,000.00 punitive damage (R. 9). The different causes of action, stated in separate counts as to each petitioner, were joined under Rule 20 of the Rules of Civil Procedure for the United States District Court. Federal jurisdiction was predicated on the jruisdictional amount and diversity of citizenship (R. 3).

Plaintiffs were employees of Humble Oil & Refining Company, and had been such employees for periods ranging from fifteen to twenty-two years (R. 1, 8, 9). Humble Oil & Refining Company was indicted in the United States District Court for the District of New Mexico on a criminal indictment in two cases, charging Humble with violating the rules and regulations of the Federal Petroleum Board with respect to certain oil production records and reports (R. 5). Plaintiffs were subpoenaed by the government, and testified as witnesses for the government in the criminal cases (R. 6). Humble Oil & Refining Company was convicted on the criminal acts charged in the indictments (R. 6). The conviction has since been affirmed. Petitioners were discharged by the respondent, Humble Oil & Refining Company, because they appeared and testified as witnesses for the government in the criminal cases against the respondent.

The Amended Complaint of each petitioner was bottomed upon the proposition that the discharge of petitioners by reason of their having testified as witnesses for the government in the criminal cases against their employer was a violation of Title 18 U. S. C. A., Section 1503, and of the public policy of the United States of America, in that by such discharge petitioners were injured in their property

rights by reason of their having appeared and testified as witnesses in the United States District Court for the District of New Mexico.

The employer-employee relationship between petitioners and respondent was governed by the terms of a collective bargaining agreement between the Employees' Federation of Humble Oil & Refining Company, the bargaining agent for the employees of respondent, and the respondent (R. 10). This contract provided in Section 10 (R. 14) the reasons for which an employee could be discharged. Testifying against the employer was not one of the reasons given for permissive discharge. The collective bargaining agreement provided in Paragraph 2 (R. 11) that it could be cancelled either by the Employees' Federation or by Humble Oil & Refining Company on thirty days notice in writing.

Respondent moved to dismiss the Amended Complaint and the different counts thereof on the grounds that the Amended Complaint failed to state claims upon which relief could be granted (R. 16). The District Court for the District of New Mexico, Honorable Carl A. Hatch, Judge, presiding, sustained the motion and dismissed the Amended Complaint and the various counts thereof (R. 17). Appeal was taken to the United States Court of Appeals for the Tenth Circuit, and the decision of the District Court was affirmed (R. 20). Judgment was entered on January 2, 1953 (R. 27).

Jurisdiction

The jurisdiction of this Court is invoked under the Judicial Code (28 U. S. C. A., Section 1254, Sub-Paragraph 1). The petition is within time, judgment having been entered in the United States Court of Appeals for the Tenth Circuit on January 2, 1953 (R. 27). (28 U. S. C. A., Section 2101, Sub-Paragraph C.)

Questions Presented

1

Does a witness in the Federal Court who is discharged by his employer in violation of Title 18 U. S. C. A., Section 1503, have a civil cause of action for damage to his property rights resulting from such discharge?

2

Is Title 18 U. S. C. A., Section 1503, a statute designed, in part, for the protection of witnesses in the Federal Courts as a class in their person and property rights to the extent that they are afforded a civil cause of action for damages to such rights?

3

Does a collective bargaining agreement between an employer and a union afford to an individual employee working under such agreement a property right in his job within the meaning of Title 18 U. S. C. A., Section 1503?

4

Does a collective bargaining agreement between a union and an employer which provides that it may be cancelled upon thirty days notice by either the union or the employer permit the employer to cancel the contract as to an individual employee only, on thirty days notice?

Reasons for the Allowance of the Writ

1

This action presents an important question of federal law which has not been, but should be settled by the Supreme Court of the United States. Petitioners were discharged by their employer because they testified against their employer under subpoena as witnesses for the government in a criminal case in the United States District Court for the

District of New Mexico. This fact is properly plead (R. 6), and for the purpose of this appeal is taken as true. (Opinion of the Circuit Court of Appeals for the Tenth Circuit, R. 20). The question of whether or not petitioners have a civil right of action for damages to their property rights against their employer by reason of their discharge in violation of Title 18, U. S. C. A., Section 1503, was a question of first impression in the Federal Courts with the decision of the United States Court of Appeals in this case, and as stated by that Court: "As far as this phase of the statute is concerned, it seems to be a qeustion of first impression" (R. 25).

2

The decision of the United States Court of Appeals for the Tenth Circuit in this case insofar as it holds that Title 18, U. S. C. A., Section 1503 was not designed in part for the protection of witnesses in the Federal Courts is in direct conflict with the holding of the Ninth Circuit in the case of *Catrino* v. *United States*, 176 F. (2d) 884; the decision of the Court of Appeals for the Fifth Circuit in the case of *Samples* v. *United States*, 121 F. (2d) 263; the decision of the United States Court of Appeals for the Eighth Circuit in the case of *Kloss* v. *United States*, 77 F. (2d) 462, and with the decision of the United States Court of Appeals for the Tenth Circuit in the case of *Broadbent* v. *United States*, 149 F. (2d) 580, all of which cases hold that the statute in question is designed in part for the protection of witnesses in the Federal Courts. The question presented by this conflict is an important question of federal law which has not been, but should be settled by the Supreme Court of the United States.

3

The holding of the United States Court of Appeals for the Tenth Circuit in this case insofar as it holds that a provision in a collective bargaining agreement to the effect that

either the union or the employer may terminate the same on thirty days notice in writing empowers the employer to terminate the contract on thirty days notice as to an individual employee is in direct conflict with the holding of the United States Court of Appeals for the Fifth Circuit in the case of *Yazoo & M. V. Railroad Company* v. *Webb*, 64 F. (2d) 902. The question presented by this conflict is an important question of federal law which has not been, but should be settled by the Supreme Court of the United States.

Conclusion

WHEREFORE, Petitioners pray that this Court issue a Writ of Certiorari directed to the United States Court of Appeals for the Tenth Circuit, and that the judgment of the United States Court of Appeals for the Tenth Circuit and of the United States District Court for the District of New Mexico be reversed by this Honorable Court.

W. T. ODELL,
R. R. IVEY,
J. A. RUSSELL,
CLEMMIE G. TAYLOR and
R. M. DENNIS,
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Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

No opinion was written by the District Court in this case. The opinion of the United States Court of Appeals for the Tenth Circuit has not been reported, but will be found in the printed record at Pages 20 to 27, inclusive.

Jurisdiction

The jurisdiction of this Court is invoked under the Judicial Code (Title 28 U.S.C.A., Section 1254 Sub-Paragraph 1). The petition is within time, judgment having been entered in the United States Court of Appeals for the Tenth Circuit on January 2, 1953 (R. 27) (28 U.S.C.A., Section 2101, Sub-Paragraph C.)

Statement of the Case and Questions Presented

For statement of the case and questions presented, see the foregoing Petition for Writ of Certiorari (Pages 2, et sequa).

Assignments of Error

1

The United States Court of Appeals for the Tenth Circuit erred in holding that Title 18 U.S.C., Section 1503 was designed solely for the protection of the administration of justice and did not have as one of its purposes the protection of the property rights of witnesses in the Federal Courts.

2

The United States Court of Appeals for the Tenth Circuit erred in holding that Title 18 U.S.C.A., Section 1503 was not designed for the protection of witnesses in the Federal

Courts as a class, and that a member of such class had no civil cause of action for damages to his property rights caused by a violation of that statute.

3

The United States Court of Appeals for the Tenth Circuit erred in holding that an employer has no civil liability to a discharged employee when he has discharged such employee in violation of a penal statute enacted for the benefit of a class of which the employee was a member.

4

The United States Court of Appeals for the Tenth Circuit erred in holding that a collective bargaining agreement between a union and an employer which provides that either party may terminate the same upon thirty days notice in writing permits the employer to terminate the contract as to an individual employee upon thirty days notice in writing.

Summary of Argument

The argument under four points is directed to the proposition that Title 18 U.S.C.A., Section 1503, commonly known as the obstruction of justice statute, is a statute designed for the protection of the administration of justice and for the protection of the property rights of witnesses before and after they testify in the Federal Courts. The petitioners in this case were discharged by their former employer, the respondent, as a result of their having appeared and testified as witnesses for the government in criminal cases pending against the respondent in the United States District Court for the District of New Mexico. These facts are well plead and on the motion to dismiss the Amended Complaint and in this proceeding are to be taken as true. The Courts below held in substance that Congress by the enactment of

this statute did not afford to witnesses as a class any protection in their personal or property rights, and that in any event the petitioners would each be limited to recover the sum of Five Hundred Dollars, the amount of their wages for one month by reason of the provision of the collective bargaining agreement governing the terms of the employment that permitted either the union or the employer to cancel the collective bargaining agreement upon thirty days notice in writing. It is the position of the petitioners in the following argument that the statute in question was designed in part for the protection of witnesses in the Federal Courts as a class. That the member of a class for whose protection a statute is enacted has a cause of action for damage to property rights protected by such statute caused by a violation of such statute. It is the further position of the petitioners that the thirty day cancellation clause in the collective bargaining agreement between the union and the respondent does not permit the termination of the contract on thirty days notice as to an individual employee, but only permits the termination of the contract in its entirety.

ARGUMENT

Point 1

Title 18 U.S.C.A., Section 1503 Was Designed in Part for the Protection of Witnesses, as a Class, in Their Property Rights.

The statute insofar as is pertinent to this case is as follows:

> "Whoever * * * injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein * * * shall be fined not more

than $5,000.00 or imprisonment of not more than 5 years, or both."

The statute before its amendment in 1945 had been construed by the Circuit Court of Appeals for the Eighth Circuit in the case of *Kloss* v. *United States*, 77 F. (2d) 462, and by the United States Court of Appeals for the Fifth Circuit in the case of *Samples* v. *United States*, 121 F. (2d) 263, in the following language:

> "(1, 2) The statute is one of the most important laws ever adopted. It is designed to protect witnesses in Federal Courts and also to prevent a miscarriage of Justice by corrupt methods. It is not necessary to its enforcement that a witness is prevented from testifying by threats or force. If a witness is corruptly persuaded to absent himself or to testify falsely the act is violated. It is immaterial whether he was subpoenaed, if he intended to testify. Walker v. United States, 8 Cir., 93 F. 2d 792."

This language was adopted by the United States Court of Appeals for the Ninth Circuit in *Catrino* v. *United States*, 176 F. (2d) 884, and by the United States Court of Appeals for the Tenth Circuit in the case of *Broadbent* v. *United States*, 149 F. (2d) 580. The Court below rejected the authority of these cases on the grounds that they were criminal cases (R. 25). The purpose for which a statute is enacted remains the same whether or no the case being decided by the Court is a civil or a criminal case. If the statement of the purpose of the act in the decisions of the Courts of Appeal for the Fifth, Eighth, Ninth and Tenth Circuits in prior decisions is taken as stated in the decisions, the decision in this case is in direct conflict with those decisions.

The Court below (R. 25) stated that the decisions above referred to were after the 1945 Amendment. Except for the *Catrino* case, those decisions construed the statute as it

existed prior to the 1945 Amendment. The statute as it existed before 1945 had been construed to apply only to pending cases. *Pettibone* v. *U. S.* (1893) 13 S. Ct. 542, 148 U. S. 197, 37 L. Ed. 419; *United States* v. *Thomas* (District Court of Virginia, 1891), 47 F. (2d) 807; *United States* v. *McLeod* (Circuit Court Ala. 1902), 119 Fed. 417.

For many years prior to the 1945 Amendment there had been in effect a conspiracy statute which applied both before and after the pendency of litigation (Criminal Code, Section 136 18 U. S. C. A., 241). Under this conspiracy statute a civil cause of action was afforded to a party injured by its violation under the provisions of Title 8 U. S. C. A., Section 47, Paragraph 2. The purpose of the 1945 Amendment was stated in the report of the Senate Judicial Committee to be contained in a letter from the Attorney General addressed to the Chairman of the Judicial Committee, U. S. Code Congressional Service, 79th Congress, First Session, 1945, Page 723. In that letter it was stated that the purpose of the amendment was to make criminal the substantive offense of injuring a witness, court officer, or juror after he had acted as such.

In the *Pettibone*, *McLeod* and *Thomas* cases, *supra*, the statute was given no effect whatever after the termination of the litigation on the theory that after justice had been administered, and the processes of the Court had ceased, the statute could afford no protection to the administration of justice. The amendment recognized the necessity of extending protection to witnesses in their personal and property rights after their appearance as witnesses, after the termination of the case, and after justice had been administered.

It could well be said that the only purpose of the 1945 Amendment was to afford protection to witnesses, court officers, or jurors after they had acted because after justice

had been administered the statute could afford no protection to the administration of justice.

We, therefore, submit that the statute in question had as one purpose the protection of witnesses in their property rights as distinguished from the purpose of protecting the administration of justice. Certainly, it presents an important question of federal law that has not been decided by this Court. This case upon the point involved, from a civil liability standpoint, is one of first impression, according to the statement of the Court below (R. 25), and so far as counsel has been able to determine. If the rights asserted in this action by these petitioners are denied, the administration of justice in the Federal Courts will receive a mortal blow. A witness in the Federal Court who is required, as these men were required, to testify against his employer will be utterly unable to recoup financial damage caused to him by the unlawful act of a convicted employer. True, the act of the employer will be criminal, but the witness, however great his financial damage, will have no remedy. As in this case, such witness can suffer the loss of his means of livelihood without remedy. We believe that the processes of the Federal Court must afford him the protection that is here sought.

POINT 2

Title 18 U.S.C.A., Section 1503 Is Designed, in Part, for the Protection of Witnesses in the Federal Courts as a Class and Affords to Such Witnesses a Civil Cause of Action for Damages to Their Property Rights Caused by a Violation of That Statute.

This case is bottomed upon the premise that Title 18 U. S. C. A., Section 1503 was enacted, in part, for the protection of witnesses in the Federal Court as a class of people. That a member of a class for whose protection a

criminal statute is enacted can maintain a civil cause of action for damages to his property rights resulting from such violation.

This action arose in the jurisdiction of New Mexico where the legal proposition stated above was recognized by the Supreme Court of that state in the case of *Pettes* v. *Jones*, 41 N. M. 167, 66 Pac. 2d 967, in the following language:

> "Not every violation of a legislative enactment will create civil liability. The rules for determining civil liability from the violation of a statute are thus set forth in Restatement of the Law, Torts, Negligence:
>
> 'Sec. 286. The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:
>
> (a) The intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and
>
> (b) the interest invaded is one which the enactment is intended to protect; and,
>
> (c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and,
>
> (d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action."

To the same effect are the following cases:

Kardon v. *National Gypsum Co.*, 69 Fed. Supp. 513;
Remar v. *Clayton Securities Corp.*, 81 F. (2d) 1014;
McComb v. *Frank Scerbo & Sons, Inc.*, 80 Fed. Supp. 457, affirmed, 177 F. (2d) 137;
Beard v. *Franklin*, 141 F. (2d) 238;
Barsness v. *Teigen*, 238 N. W. 161, 76 A. L. R. 1317.

The Court below rejected the authority of these cases involving the National Safety Appliance Act, the Securities

Exchange Act, and the Fair Labor Standards Act, in the following language:

> "There is a group of cases all dealing with regulatory measures for the express benefit of a class in which it has been held that the penal provision of the statute was not the exclusive remedy for its violation but that any person injured by its violation could maintain a cause of action for damages suffered. Texas & Pacific Ry. Co. v. Rigsby, supra, centered around the National Safety Appliance Act; Kardon v. National Gypsum Co., 69 F. Supp. 512, involved a violation of the Securities Exchange Act; McComb v. Frank Scerbo and Sons, 80 F. Supp. 457, involved the Fair Labor Standards Act. All of these Acts were passed for the special benefit of the group covered thereby."

We assert that the obstruction of justice statute was passed for the benefit of the persons protected by that statute and for their special benefit in addition to the purpose of protecting the administration of justice.

The Securities and Exchange Act was passed primarily for the purpose of giving a government agency an effective method of reducing the amount of a nation's credit resources which could be directed by speculation to the stock market. The protection of investors was a by-product of the main purpose of the act, yet the Federal Courts have consistently afforded Civil remedies to persons injured by a violation of that act. The proposition is clearly stated in *Remar* v. *Clayton Securities Corp.*, 81 Fed. Supp. 1014, as follows:

> "II. The second question is whether, if Clayton violated Para. 7(c) of the Securities and Exchange Act, 48 Stat. 887, 15 U. S. C. A. Para. 78g, the violation gives plaintiff as a private person a right of action to recover from defendant on account of injuries plaintiff sustained as a proximate consequence of Clayton's violation.

(2) The Securities and Exchange Act does not expressly give a right or remedy to a private person injured by Para. 7(c) of that Act. But such a right may nonetheless be implied. Cf. Beard v. Franklin, 2 Cir., 141 F. 2d 238; Goldstein v. Groesbeck, 2 Cir., 142 F. 2d 422, 154 A. L. R. 1285; Downing v. Howard, 3 Cir. 162 F. 2d 654, 658; Kardon v. National Gypsum Co., D. C. E. D. Pa., 69 F. Supp. 512, Id., D. C. E. D. Pa., 73 F. Supp. 798. See Note, 61 Harv. L. Rev. 858. The general principle regarding civil liability for violations of prohibitory statutes has been put with precision in Restatement, Torts, Para. 282. Broadly stated, the rule is that where defendant's violation of a prohibitory statute has caused injury to plaintiff the latter has a right of action if one of the purposes of the enactment was to protect individual interests like the plaintiff's.

(3) That the rule applies to the case at bar. Undoubtedly 'the main purpose' of Para. 7 of the Securities and Exchange Act was 'to give a government credit agency an effective method of reducing the aggregate amount of the nation's credit resources which can be directed by speculation into the stock market.' House Com. Rep. 73rd Cong., 2nd Sess. No. 1383. But Congress recognized that 'protection of the smaller speculator by making it impossible for him to spread himself too thin * * * will be achieved as a by-product of the main purpose.' Ibid. In short, the intent of the enactment was in part to protect an individual like plaintiff from losing his equities in stocks pledged to a broker, dealer or bank, due to his having a lower margin than the level approved by the Federal Reserve Board."

The National Safety Appliance Act, as we understand it, was enacted not only for the safety of the employees of the railway company, but for the safety of the travelling public. The Fair Labor Standards Act certainly has a broader public purpose than that sought to be given it by the decision of the Court below. It was passed primarily to strengthen

the economy of the nation, and not only for the purpose of increasing the wages of individual employees.

Petitioners submit that the Court of Appeals erred in holding that Title 18 U. S. C. A., Section 1503 did not afford them a civil cause of action for damage to their property rights caused by its violation. Petitioners submit that they are entitled to have a Writ of Certiorari by reason of the conflict between the decision below and the decisions of the Federal Courts, including the United States Supreme Court, cited under this point, and further, that the question presented is so important to the administration of justice in the Federal Courts that it should be decided by this Court.

POINT 3

An Employee Who Is Discharged by His Employer in Violation of a Penal Statute Enacted for the Benefit of a Class of Which the Employee Is a Member Has a Civil Right of Action for Damages Caused by His Discharge.

The Court below held an employer had an absolute right to discharge an employee. That the only cause of action in such case was for breach of contract for which punitive damage could not be recovered, in the following language:

> "It is the universally recognized rule that in the absence of a contract or statutory provisions an employer may discharge an employee without cause or reason or for any cause or reason. So also it has been held by the overwhelming weight of authority that the discharge of an employee in violation of his contract irrespective of the motive therefor constitutes only a breach of contract and not a tort and thatt he recoverable damage are limited to those flowing from the contractural breach and that no punitive damages are recoverable no matter what the motive that prompted the discharge. The only exception to the rule is where the wrongful discharge is tinctured with fraud. But

> for obvious reasons motive for discharge alone does not partake of any of the elements necessary to constitute fraud" (R. 26).

The error of the Court's decision is apparent. In the instant case the discharge is in violation of a contract and of a statute. The tort arises in this case by reason of the injury to the property rights of petitioners as witnesses in the Federal Courts in violation of the statute that has been quoted. That petitioners as third party beneficiaries of the collective bargaining contract have a right to maintain a cause of action as the beneficiaries of that contract is settled in New Mexico by the case of *Johnson* v. *Armstrong & Armstrong*, 41 N. M. 206, 66 Pac. 2d 992. It is a doctrine recognized in the Tenth Circuit in the case of *Beeler* v. *Chicago R. I. & P. Railway Co.*, 169 Fed. 2d 557. A leading case is from the Ninth Circuit case of *MacKay* v. *Loew's, Inc.*, 182 Fed. 2d 170.

If the employee has an interest in his job that will permit him to maintain an action for breach of contract in violation of the terms of a collective bargaining agreement, certainly that job in such an instance is a property right within the meaning of Section 1503. If that property right is destroyed, then petitioners have a right to maintain their action for its destruction. That this action might be a new action does not affect the right to maintain it. This Court stated the doctrine in *Bell* v. *Hood*, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939, as follows:

> "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that Courts will be alert to adjust their remedies so as to grant the necessary relief."

The doctrine is stated by Judge Hand, of the Circuit Court of Appeals for the Second Circuit, in the case of *Bomar* v. *Keyes*, 162 F. 2d 136 (Certiorari Denied, 68 S. Ct.

166, 332 U. S. 825, 92 L. Ed. 400. Rehearing denied, 68 S. Ct. 266, 322 U. S. 845, 92 L. Ed. 416), in the following language:

> "(5) We start with the assumption that it was Keyes's complaint which caused the Board of Education to discharge the plaintiff, and that the ground of the discharge was her service upon a federal jury. If so, both Keyes and the Board united to cause pecuniary loss to the plaintiff by an act which the statute had made a legal wrong: Keyes, by instigating the Board, the Board by acting upon her instigation. We do not mean to suggest that a teacher may absent herself from her work indefinitely, and serve on a jury without regard to her duty; i.e., that she may choose her own time or stay away as long as she pleases. Certainly there are 'reasonable' limits to the exercise of her privilege; but the question whether she kept within such limits we cannot decide now; it must be tried, for all we have is that her service as such was the ground for her discharge. That wrong is independent of any breach of contract, and would be the same, if Keyes had induced the Board not to employ the plaintiff; indeed, we assume that her discharge by the Board was not a breach of contract at all. Nevertheless, it may have been the termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect against invasion by acts themselves unlawful, such as the denial of a federal privilege."

We submit the decision of the Circuit Court of Appeals for the Tenth Circuit in this case in connection with this point is in conflict with the decisions above cited and the general law. It presents an important question of federal law which has not been, but should be, settled by this Court. It is a question that applies to every person in this nation who works for his living and who may be called by the government as a witness to testify against his employer.

POINT 4

Where a Collective Bargaining Agreement Between a Union and an Employer Permits the Contract to be Cancelled on Thirty Days' Notice in Writing, the Employer May Not Cancel the Contract as to an Individual Employee.

The contract provides: "2. This agreement shall be and remain in force and effect until cancelled by either party hereto upon thirty days notice in writing to the other party." (R. 11). The contract has been in effect since June of 1937 (R. 16). The Court below held that the right of recovery of the petitioners was limited to thirty days wages, or the sum of Five Hundred Dollars, in the following language:

> "The contract with the employees' bargaining representative provided that it could be terminated by either party by giving thirty days notice in writing. Where a contract of employment expressly empowers an employer to terminate the contract upon giving notice, recovery for wrongful breach is limited to the notice period. The complaint alleged that each applicant was receiving a salary which together with other valuable incidents to his job was of the value of $500 per month. Under the provisions of the contract, one month's salary was the maximum amount recoverable for breach of contract."

(R. 27.)

The Court in support of the statement cited the case of *F. W. Woolworth* v. *Peterson*, 78 F. (2d) 47, from the Tenth Circuit, and the case of *Olsen* v. *Arabian American Oil Company*, 194 F. (2d) 477, from the Second Circuit. Each case involved an individual contract of employment, and did not involve a collective bargaining agreement.

The decision of the Court below is in direct conflict with the decision of the United States Court of Appeals for the

Fifth Circuit in the case of *Yazoo & M.V.R. Co.* v. *Webb*, 64 F. (2d) 902, where that Court in passing on a collective bargaining agreement containing a cancellation clause said:

> "We reject the contention that if Webb be under the wage agreement with the Brotherhood of Trainmen that it was abrogated as to him by its own terms thirty days after notice that his wages were changed. The provisions for abrogation involves the agreement as a whole and not its application to the wages of some one employee. The agreement aims at uniformity of treatment and cannot be dissipated by piecemeal. The notice contemplated by it is one in writing and posted in the bulletin board for the information of all, or at least one given to the brotherhood which signed the agreement. Webb's rights are not to be disposed of on the basis of an abrogation of the wage agreement."

It is perfectly obvious that the Court was in error in its holding in this respect. These collective bargaining agreements govern the terms and conditions of the employment of a large percentage of the working people of the United States. They are the very foundation of our modern economic system. These cancellation provisions appear in almost all of these collective bargaining agreements. The effect of the holding was to permit the respondent in this case to discharge its employees by cancelling the contract as to them only, thereby limiting their liability to $500.00 for breach of contract, yet retaining the benefits of their contract with the union which had been in force since 1937. We do not believe it to be the law that a collective bargaining agreement may be terminated piecemeal under such a cancellation clause. This question is certainly one of wide importance in the industrial life of America. There is a conflict between the decision of the Tenth Circuit in this case and the decision of the Fifth Circuit in the *Yazoo* case, *supra*, that cannot be reconciled. Its importance cannot be

minimized because it affects every collective bargaining agreement in existence.

Conclusion

We respectfully submit that a Writ of Certiorari should be issued, and that upon the hearing, the judgment of the United States District Court for the District of New Mexico and of the United States Court of Appeals for the Tenth Circuit in this case be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 657

W. T. ODELL, R. R. IVEY, J. A. RUSSELL, CLEMMIE TAYLOR AND R. M. DENNIS, *Petitioners*,

v.

HUMBLE OIL & REFINING COMPANY, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals (R. 20-27) is reported at 201 Fed. 2d 123.

Questions Presented

1. Does the discharge of an employee constitute a criminal offense under Title 18 U.S.C.A., Section 1503?

2. Does Title 18, U.S.C.A., Section 1503 create civil liability?

3. Does a contract carry any greater liability for its breach than damages for the period of notice specified in its termination clause?

Argument

First Counterpoint
(In Reply to Points 2 and 3 in Petitioners' Brief)

The discharge of an employee, even if wrongful and malicious, could not constitute a violation of Title 18 U. S. C. A., Section 1503.

Throughout their petition and brief petitioners assume their major premise, viz: that the discharge complained of was a violation of Title 18, U.S.C.A., Section 1503. Although it is apparent that the decision below was correct if no violation of this statute is plead, petitioners cite no authority and advance no sound argument to support their naked statement that a wrongful discharge violates the statute.

Unless the statutory language "*injures* any * * * witness in his * * * property" is broad enough to cover the wrongful discharge of an employee, it is plain that Section 1503 was not violated by the alleged discharge of petitioners.

The Court of Appeals held that a mere discharge, regardless of motive, was not a tort and could not constitute an "injury" within the meaning of the statute (R. 26-27). Respondent submits that this holding is correct and disposes of the entire controversy.

If we assume that Section 1503 creates civil liability, it must be conceded that such liability could arise only in the case of an injury resulting from some act declared by the statute to be unlawful. Even if harm were done to the property of a witness, no cause of action could exist unless

that harm resulted from an act which violated Section 1503. This is the established rule in treble damage suits brought under the section of the Sherman Act (15 U.S.C.A., Sec. 15) which expressly creates civil liability for injury to business or property resulting from a violation of the Act. ALEXANDER MILBURN CO. v. UNION CARBIDE & CARBON CORP. (4th Cir.), 15 Fed. 2d 678, 683; JACK v. ARMOUR & CO. (8th Cir.), 291 Fed. 741, 745.

The word "injury" has a well understood meaning. In construing statutes which contain the word "injure" or "injury" the courts of this country have held uniformly that the word "injury" means: "Damage resulting from an unlawful act—not a lawful one." STATE v. MOORE, 39 A. 584, 585, 69 N.H. 99; BOHN MFG. CO. v. HOLLIS, 55 N.W. 1119, 1121, 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319; STATE v. VAN PELT, 49 S.E. 177, 185, 136 N.C. 633, 68 L.R.A. 760; REYNOLDS v. PLUMBERS' MATERIAL PROTECTIVE ASS'N, 63 N.Y.S. 303, 309; O'MALLEY v. STATESMAN PRINTING CO. (Idaho), 91 P. 2d 357, 359.

It is well established also that the word "injury" is applicable only to such a legal wrong as would give rise to a cause of action for damages at common law. WOODRUFF v. NORTH BLOOMFIELD GRAVEL MINING CO., 18 F. 753, 781; PARKER v. GRISWALD, 17 Conn. 287, 298, 42 Am. Dec. 739, 746. In PENN. R. CO. v. MARCHANT, 119 Pa. St. 541, 561, 13 A. 690, it is said:

> "We understand the word 'injury' or 'injured', as used in the constitution, to mean such a legal wrong as would be the subject of an action for damages at common law."

There can be no "injury" without a violation of an existing legal right. KEOGH v. CHICAGO & N. W. R. CO., 260 U.S. 156, 163; MALTZ v. SAX (7 Cir.), 134 F. 2d 2, 4;

LUELLEN v. CITY OF ABERDEEN, 148 P. 2d 849, 855, 20 Wash. 2d 594; CASON v. BASKIN, 20 So. 2d 243, 250, 155 Fla. 198, 168 A.L.R. 430.

The error in petitioners' theory is fundamental. The discharge of an employee is at most a breach of contract and cannot constitute a tort or "injury", regardless of malice or motive. The only act which respondent is alleged to have committed is the discharge of petitioners. This act, a simple breach of contract at most, cannot be converted into a tort by alleging that it was done maliciously and for revenge.

There have been many cases where discharged employees have sought unsuccessfully to maintain tort actions. The fallacies in petitioners' theory are discussed at length in ELMORE v. ATLANTIC COAST LINE R. Co., 191 N.C. 182, 131 S.E. 633, 635, 636, 637. Also directly in point are MITCHELL v. STANOLIND PIPE LINE COMPANY, 184 F. 2d 837, 838; GENUINE PANAMA HAT WORKS v. WEBB (D.C. N.Y.), 36 F. 2d 265, 266; COMERFORD v. WEST END STREET RY. Co., 164 Mass. 13, 41 N.E. 59, 60.

There is no conflict between the decision in the present case and BOMAR v. KEYES, 162 F. 2d 136, which was an action against a *third person*—not a suit against the employer. Decisions to the effect that an employee has a cause of action against a *third person* who has interfered with his employment have no bearing upon the rights and liabilities existing between employer and employee. It is settled that rights and liabilities, as between employer and employee, are covered entirely by the contract of employment.

Finally, it must be remembered that Section 1503 is a criminal statute and that no civil liability to petitioners could arise under that statute unless respondent is also criminally liable. It is universally recognized that penal statutes must be strictly construed and that the courts will not

extend a penal statute by construction to apply to an act which is not expressly condemned by the clear language of the statute. U. S. v. ALPERS, 338 U.S. 680, 681. Certainly Section 1503 cannot be stretched to make a crime of a simple breach of contract. Moreover, petitioners in their contention run afoul of the settled principle that a mere breach of contract is not a crime and cannot give rise to any criminal liability. One of the essential attributes of liberty of contract is the constitutional right to terminate contracts, subject only to civil liability for unwarranted termination. 11 AM. JURIS., CONSTITUTIONAL LAW, Section 346.

Second Counterpoint

(In Reply to Points 1 and 2 of Petitioners' Brief)

Title 18 U.S.C.A., Section 1503, creates no civil liability.

Under their points 1 and 2, petitioners contend that Section 1503 creates civil liability. The statute does not purport to do so; on the contrary, it is purely a criminal statute. Petitioners argue that this statute should be "construed" as creating civil liability. Their argument advances the following theories: (1) One of the purposes for which Section 1503 was enacted was the protection of witnesses, (2) witnesses are, therefore, a class for whose special benefit the statute was designed, so (3) any witness whose property rights are damaged has a cause of action against the offending party.

The statutory language to which petitioners seek to apply this theory reads as follows:

> "Whoever corruptly or by threat or force * * * endeavors to influence, intimidate, or impede any witness, in any court of the United States * * * or injures any party or witness in his person or property on account

> of his attending or having attended such court * * * or on account of his testifying or having testified to any matter pending therein * * * or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000.00, or imprisoned not more than 5 years, or both."

As pointed out by the court below (R. 25) there is no authority to support petitioners' contention. On the contrary, as demonstrated by the opinion of the court below, the "construction" contended for by petitioners is opposed to well settled principles of law. In the first place, the statute is a criminal law and must, therefore, be strictly construed. UNITED STATES v. ALPERS, 338 U.S. 680, 681. In the second place, the rule is that a statute which does not purport to create civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to a construction establishing civil liability. BEEGLE v. THOMSON, 138 F. 2d 875, 880. (Cert. Den. 322 U.S. 743); 50 AM. JURIS., STATUTES, Sec. 586.

It is perfectly clear from the language of Section 1503 that the purpose of the statute is to protect the administration of justice. Unquestionably, the statute was designed to protect witnesses in the sense that all criminal laws are designed to protect the public. BROADBENT v. UNITED STATES, 149 F. 2d 580, 581, and the other decisions cited on page 10 of petitioners' brief, go no further than this.

The statute prohibits injury to *witnesses*, including all persons who have been witnesses in the past or may be witnesses in the future. This "class" embraces every man, woman and child in the United States. "Witnesses" is as broad a category as "people", so the statute must be said to protect the public as an entity and not to be for the benefit of petitioners as individuals.

Nor is there any support for petitioners contention in the decisions cited on page 13 of their brief. Those decisions construe as creating civil liability certain other penal laws, such as the National Safety Appliance Act, the Securities Exchange Act and the Fair Labor Standards Act, which contain exclusive and detailed codes regulating particular fields of business activities for the purpose of protecting certain individuals from conditions found by Congress to exist in those businesses. As stated by the court below: "All of these acts were passed for the special benefit of the group covered thereby." (R. 24). There is no analogy between those statutes and the statute here involved.

Furthermore, in construing any statute, the courts always must consider the needs which the statute was intended to meet and the benefits which it was intended to produce. HAYS v. MICHIGAN CENTRAL RR. Co., 111 U.S. 228.

Was there any need for Congress to provide civil liability for malicious injury to the property of witnesses? Is it true, as petitioners assert, that witnesses in Federal courts are doomed to suffer great wrongs without remedy unless this court is willing to extend Section 1503 to create civil liability? Certainly not, because the common law of the various states always has provided a remedy for malicious injury to the property of all persons, whether witnesses or not. Indeed, there is no question that petitioners would have a remedy under the New Mexico law if they have any cause of action either in tort or breach of contract. Petitioners are seeking to avoid well settled rules of law with respect to the measure of damages. What they allege is at most a contract claim. They hope to twist it into a tort claim by inducing this court to place a strained construction upon a purely penal statute, and thereby to swell their damages to fantastic proportions in the form of punitive damages.

There having always been a remedy for malicious injury to person or property under the state law, a federal statute creating an additional remedy would have been a useless thing. The only need that existed was for the added sanction of criminal responsibility, which of course could *only* have been created by federal statute; the intent to provide such responsibility is the only intent which can reasonably be ascribed to Congress.

Third Counterpoint

(In Reply to Point 4 in Petitioners' Brief)

The Court of Appeals correctly held that the complaint negatived the existence of Federal jurisdiction.

Having held that the complaint failed to state a *tort* claim upon which relief could be granted, the Court of Appeals considered whether a claim for *breach of contract* was stated. The only contract alleged in the complaint is the contract between the labor union and respondent and it contains a thirty day cancellation clause (R. 11). The Court of Appeals said:

> "The contract with the employees' bargaining representative provided that it could be terminated by either party by giving thirty days notice in writing. Where a contract of employment expressly empowers an employer to terminate the contract upon giving notice, recovery for wrongful breach is limited to the notice period. The complaint alleged that each appellant was receiving a salary which together with other valuable incidents to his job was of the value of $500 per month. Under the provisions of the contract, one month's salary was the maximum amount recoverable for breach of the contract.
>
> "Whenever it clearly appears from the complaint as a whole that the maximum possible recovery is less than

> the minimum jurisdictional amount necessary to confer federal jurisdiction of the subject matter, a bare allegation that there is in controversy more than $3,000 exclusive of interests and costs is insufficient to state a cause of action of which a federal court has jurisdiction."

Respondent submits that this holding unquestionably is correct. Viewed as a suit for breach of contract, this suit could yield each petitioner a maximum recovery of only $500.00 because that sum is alleged to be the value of the job of each petitioner for thirty days, the notice period (R. 7). It is the universal rule that recovery is limited to the notice period where the contract expressly provides that the employer may terminate the service at any time by giving notice. 35 AMERICAN JURIS., MASTER AND SERVANT, Section 54. This rule is applicable where the contract relied upon is one between an employer and a labor union. 31 AMERICAN JURIS., LABOR, Section 125.

There is no conflict between the holding in the present case and YAZOO & M.V.R. Co. v. WEBB (5 Cir.), 64 F. 2d 902, 903, as argued by petitioners. That case is totally unlike the present case and is no authority for petitioners' proposition. It was not a suit for discharge at all but for back wages. There the employer had not terminated the contract as to the plaintiff, but, on the contrary, admittedly had operated under it during all the years in question. The contention of the defendant was that the first underpayment had occurred beyond the bar of the statute of limitations, that the breach of the contract was then complete and that therefore the whole cause of action was barred. The effect of the holding was that, since each periodic underpayment gave the plaintiff a cause of action (the contract remaining in effect between the parties), the whole claim was not barred. Furthermore, the language on this

subject must be considered *dictum*, since the case was decided on the independent ground of estoppel.

When the fundamental principles involved are considered, it becomes clear that if petitioners have any rights under the union contract they are necessarily subject to the 30-day notice period. If petitioners base their claim under the contract upon the theory that the union was their agent, then they are, in legal contemplation, parties to the contract and obviously are bound by all its terms. This was the holding in BRITT v. TRAILMOBILE CO. (6 Cir.), 179 F. 2d 569, 572 (cert. denied, 340 U.S. 820).

On the other hand, if they pursue the theory that they were not parties to the contract but were third party beneficiaries of it, their position is no better. MACKAY v. LOEW'S INC. (9 Cir.), 182 F. 2d 170, 172; MINOR v. WASHINGTON TERMINAL CO., 180 F. 2d 10, 11. If petitioners urge that the terms of the union contract are to be incorporated into their individual contracts of employment upon the third party beneficiary theory, then they must incorporate all of such terms, not only such parts as they consider beneficial to themselves. COMMISSIONER v. KELLER, 59 F. 2d 499, 502; IN RE CONNECTICUT CO., 95 F. 2d 311, 315.

Petitioners argue that by failing to cancel the union contract at the time it discharged petitioners, respondent became saddled with a liability in damages equal to the expected earnings of petitioners during the rest of their lives. This in spite of the fact that the contract can be cancelled at any time upon 30 days' notice! By some legerdemain, unexplained and unsupported by authority, petitioners claim the absolute right to jobs for life under a contract which has no assured existence beyond 30 days. If petitioners' claim is sustained, then petitioners are in far better position than their former fellows, still employed by respondent, who are assured of 30 days' tenure at most.

Evidently petitioners claim that their discharge removed from the contract the 30-day cancellation clause, in so far as petitioners are concerned, but left all other provisions intact.

Conclusion

The case was decided upon fundamental and well settled legal principles, and no conflict is involved. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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